1894

Equitable Assignments

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E Q U I T A B L E A S S I G N M E N T S.

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I N T R O D U C T O R Y

"The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice."

These are the words of Lord Coke in his great opinion delivered in Lampet's Case (10 Co. 47 a). They contain the reasons of one of the greatest of English judges for the existence of the rule at common law which prohibited the assignment of any possibility, right, title or thing in action. This rule was absolute. No matter how valuable the possibility or interest might be; no matter how certain and definite the event upon the happening or non-happening of which such possibility would become present and vested; no matter how formal the proceeding or how strictly the instrument of intended trans-

fer was phrased; if the subject was not in actual or potential existence at the time of the grant or assignment, he who attempted to enforce his claim found himself perfectly powerless in a court of law.

There seems to be some chance for difference of opinion respecting the reasoning for the strict adherence to this rule. The origin of this rule was attributed by Coke to the "wisdom and policy of the sages and founders of our law", to discourage maintenance and litigation. This seems broadly reasonable and extremely plausible. Undoubtedly an unrestricted power of assigning future interests and expectancies, might give rise to many secret as well as annoying transactions which would be entered into for the satisfactions of private animosities or for the satisfaction of some unprincipled desire for gain. Such a power might, indeed, be the "occasion of the multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants and the subversion of the due and equal execution of justice". As a result, a just and discriminating public policy would demand that this power would be withheld, or at least, curtailed to an extent that would deprive the ex-

ercise of that power of its evil consequences. It is thus readily observed that Lord Coke bases the reasons for his opinion in Lampet's Case squarely on the broad principles of public policy anduniversal justice as those principles were discovered and applied by the sages and founders of English law.

It has already been stated that there is opportunity for difference of opinion in regard to the scientific basis of this common law rule against the unrestricted a assignment of choses in action. Happily for the evolution and development of Anglo Saxon law and jurisprudence no opportunity for difference of opinion, in the wide and widening fields of law and equity, has been left unseized by the judicial and controversial minds of England and America. Consequently criticisms of the reason given by Lord Coke for the existence of this rigid common law rule are ~~rigid~~ frequent and lengthy. It has been argued with much plausibility that this rule was the logical outcome of the primitive notion of a contract as being purely personal and originating no liability outside of the parties immediately included in its terms. (Pollock' Prin. of Con., p. 202). The primitive notion of a con-

tract! Whence comes this "primitive view of a contract"? Was the contract created first and then followed by the creation of man whose legal nature was so constructed as to blend harmoniously with the nature of the contract? Did the contract spring full grown from the brow of justice, or was the essential nature of the contract and evlution from the slow centuries of social existence? Which is first the man or the contract? It would seem that necessity precedes principle. The nature of man and the necessities of the social structure are the prime forces which in the play and inter play of their respective tendencies evolve a public, social policy of utilitarian justice. Public policy is an evolution. It is the trusty pilot that guides the mind of the judge through the intricacies of present necessity and past principle and practice, so that, while he glides clear of absolute individualism on the one hand, he also avoids on the other, the equally dangerous tendency of absorption of the individual in the state. That is, expressing the same idea in another way, public policy protects each particular individual, but never a particular individual at the expense of society as a whole. Nothing lives

that goes against public morals. Nothing long continues that militates against sound public law. Nothing survives that contervenes public justice. These are all but parts of a great public policy. It is evident, therefore, that every principle, every custom, every law, which serves to knit society more closely together and which tends to produce the greatest good to the greatest number, is but a child of public policy. A contract is one of the many progeny. It never had nor has it now, any of the inherent qualities nor virtues of its own. It has always looked and still continues to look, to public policy for its interpretation, force and effect. Let public policy once demand it and the entire nature of the contract would be changed as soon as a test case could receive final adjudication in the courts of justice.

In view of all this it is somewhat difficult for the ordinary individual to perceive just how Mr. Pollock is to be justified in his criticism of Lord Coke regarding the foundation of the common law rule against the assignment of choses in action. At best, it is but calling attention from the great principle to one of its applications. This may be clarifying and useful, but it should hardly

be made the occasion of an attack on merit. Lord Coke attributes the existence of the rule to broad public policy; Mr. Pollock, to one phase of public policy. A ship founders in mid-ocean during a heavy sea; Lord Coke holds that the destruction of the vessel is caused by the sea; Mr. Pollock contends that it is caused by the waves. Observe the difference.

C H A P T E R II.

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ASSIGNMENTS OF CHOSES IN ACTION AT THE COMMON LAW

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The subjects of property are divided into two classes, things in possession and things not in possession. Things not in possession may be subdivided into those things of which there is the right of present possession and those concerning which there is a mere right of future possession. Now the common law had no means or methods of dealing completely with the second of these classes. That is to say, the only ownership which the common law completely recognized was the ownership accompanied by possession. But where the ownership and the possession were severed the only right which the common law recognized was the right to recover possession. In other words the right of the real owner was simply a law suit— a chose in action.

It has already been shown in a way how seriously the common law objected to the transfer of choses in action. Where there was a present right to the future acquisi-

tion of property, the common law was still more at fault, for there was not even a right to recover the goods but only a right to recover damages for their non-delivery. When we seek the reason for this rule we find it in the motive already mentioned — an apprehension that justice would fail and oppression would follow if possibilities, titles, rights of action, etc. might be assigned. "Nothing" says Lord Coke, "Nothing in action, entry, or re-entry, can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed". (Co. Lit. 114 a). The modern writer is willing to admit, indeed, is even very anxious to point out, how feeble, partial and corrupt must have been the administration of justice where such reasons could exercise such a decisive force. He desires to impress (inefaceably) upon the mind of the student who is anxious to obtain a broad and scientific comprehension of the gradual evolution of law, just the manner in which early justice was administered, together with such a perfect idea of the problems and conditions with which jurists were compelled to grapple as will soften a too severe condemnation of the devious

course which justice was forced to follow. It is only by recurrence to history that we can trace the true reasons of the English law. It is only by a just and sympathetic interpretation of historical conditions and phenomena that we are able fully to appreciate the virtues of external systems which are now practically obsolete, or venerate sufficiently the men whose genius conceived and whose power sustained them. We must, in order to ascertain the sense and extent of their systems and doctrines, bear in mind the state of society which produced them, the evils for which they were intended to afford a remedy, and the different state of things to which they are now applicable. In early times there were reasons why there was such a horror of maintenance; there were changes in the nature of man and of his view of society before this horror was dissipated; there were good, sound, solid, practical reasons why things in action were not vendible. If those reasons have ceased to exist and time has given a more perfect conception of the relations of debtor and creditor, it is not so much due to our own inherent superiority as it is to the fact that those men of old builded just the best they knew with the crude ma-

terials at hand.

Besides, however, the horror of maintenanece and champperty which animated the breasts of the early Eng lish judges, there was another reason which helped to form the logical basis of this rule. In the eye of the law there could be no valid sale unless the thing to be sold was in rerum natura, and under the immediate control of the vendor. The law regarded it as absurd that an attempt should be made to accomplish a sale when the thing to be sold was not in the actual ownership of the seller. Consequently it prevented such sales by falling back upon the rude common-sense notion that if you had not a thing you could not sell it.

But whether these reasons were good or bad the fact remains: the common law rule that possibilities or choses in action were not assignable was well nigh absolute. Only two exceptions were countenanced by the courts. The King could always either grant or receive a possibility or chose in action by assignment without such transaction receiving the condemnation of the court.

Co Litt. 232 b n. 1;
Com. Dig. (Assignment) D. 555;
Miles v. Williams, 1 Pr. Wms. 252;
Stafford v. Buckley, 2 Vesey 177-181;
3 Peters (U. S.) 12.

The other exception which crept half scared into the decisions of the common law judges because of the peculiar nature of the subject matter of the transfer, was the case of annuities. They might be assigned with comparative freedom. Gerard v. Boden (hetl. 80). No doubt this exception of annuities from the operation of the law was thorpughly illogical; but it was perhaps felt that it would be noticeably burdensome if this very common species of personal estate should not enjoy the same privileges of alienability which were possessed by personalty in possession. Anyhow the exception is well established.

Choses in action not being assignable at law it followed that the person to whom they were assigned could not at law sue in his own name. Indeed, the right of action is an essential part of the assignment as viewed by the law. It must be remembered that in early English history the protection of the poor against the oppression of the rich, the debtor against the exactions of the creditor, was one of the great occasions which called for judicial interference, especially on the part of the Chancellor. Could we in any wise logically separate the

right of action from the assignment proper, we readily perceive how futile it would be to prohibit the act itself and still when that act was accomplished, enrich the wrong doer with the fruits of his illegal effort. This, the early jurist plainly foresaw, would change the sword of the enemy from his left hand to his right, thus endangering the security of private property and the liberty of the individual.

C H A P T E R III.

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THE ATTITUDE OF EQUITY TOWARD THE ASSIGNMENT OF CHOSES IN ACTION.

From a very early date courts of equity viewed askance the common law principle which prohibited almost unqualfiedly the assignment of things in action. That system which Lord Coke considered the "Perfection of human wisdom", the court of chancery regarded as semi-barbarous or, to say the least, narrow and absurd. "Acting upon the principle that a man may bind himself to do anything which is not impossible, and that he ought to perform his obligations when not illegal, equity has always held that the assignment of a thing in action for a valuable consideration ought to be enforced; and has also given effect to assignments of every kind of future and contingent interest and possibility in real or personal property when made upon a valuable consideration."

I Ves. Sr. 331; 2 Eq. L. C. 1531; 1 Ves. Sr. 409-411; 1 Pr. Will. 378-381; 1 Ch. Rep. 29; 1 Ch. Cas. 4-8; 2 Atk. 417-421; 33 N. J. Eq. 614; 91 Pa. St. 96. 3 Met. 121; but see L. R. 8 Eq. 697; 2 Story Rep. 630; 35 Cal. 378; 45 Mo. 106; 6 Robt.(N. Y. 104; 41 Vt. 533; Bigelow on Estoppel 331.

In the civil law and in the jurisprudence of the modern commercial nations of Continental Europe there does not seem to be any foundation for an objection against the assignment of debts. They seem to have been assigned in the most flourishing of the commercial countries of Europe and for the most part suit could be broughtin the name of the assignee.

> Pothier on Sales (by Cushing) n. 550, 55-559;
> Troplong des privil. et hypoth. tom. I. n. 340-343;
> Civil Code of France, Art. 212;

In the code of Justinian the same attitude is manifest: "Nomdnis autem venditio et ignorqnte, vel invito eø, adversus quem actiones mandantur, contrahi solet." (Code Lib. 8, tit. 42, 1.). It is also a matter of common knowl edge that bills of exchange were trasnferable or assignable at a very early date; and an assignement wo ld have f-ll effect in transferring the title even though made without the knowledge and agsinst the will of the debtor. (1 Domat. L. 4, Secs. 3 and 4). Slight and infrequent exceptions might be found to this general rule as for example, where the laws of a particular and isolated country especially prohibited it, or hwere, as in certain instances, it was not drawn with all the due formalities and requisites of the customary bill of exchange. Even in these exceptions the courts did not reject them from

a sense of outraged form, but rather from a sense of possible, if not probable, danger. Long experience had taught that only an instrument in the precise stereotyped form could be used in transferring debts without loss to some innocent party; and any variation from that form would give immediate notice of an opportunity for fraud.

Equity, more liberal in its views, and less trammelled in the administration of justice, followed in the footsteps of progress and heeded the voice of necessity. As before stated, from a very early period assignments which found no place in the narrow justice of the law found response for their necessity in the liberal heart of equity. The principles upon which equity carried those assignments into effect were precisely the same as those upon which they enforced the performance of an agreement when not contrary to their own rules or public policy.(Freem. Ch. Rep. 145; 1 Pr. Will. 381). "Such an assignment", observes Lord Hardwicke, "always operates by way of agreement of contract, amounting, in the consideration of the court, to this, that one agrees with another to transfer or make good that right or interest, (Wright v. Wright, 1 Ves. Sr. 412), and like any other

any other agreement, the court will cause it to be specifically performed (not leaving the assignee to his action for damages) where the assignor is in a condition to transfer the property, or to cause it to be transferred to his assignee." It was but a natural consequence then, that the assignee of an ordinary thing in action, as a debt issuing out of a contract relation, acquired an immediate equitable ownership therein so far as it is possible to predicate property or ownership of a species of right; and the assignee of an expectancy, possibility, or contingency acquired the right of exercising control over the proceeds as fast as they came into actual existence on the ground that the expectancy or contingency had been transformed into a present interest in possession. (10 H. of L. 191) Equity stretched its hand across the interval of time and upheld the right of the assignee until he was ready to receive it in use. The absolute possessory right was held in abeyance by the very nature of the thing assigned until the equitable ownership should ripen into the absolute right of possessiona and enjoyment on the happening of the anticipated event.

It has already been observed that the assignee of a chose in action could not sue in his own name. But it is the settled rule in all the states where choses in action are allowed to be assigned that the assignee can be sued in his own name. If the thing in action is itself legal the assignee obtains a legal interest as a result of the assignment. The equitable rule that an assignee can sue in his own name does not in any way enlarge the list of assignable things; it simply applies to things in action which, tested by other principles and rules, are assignable; and if they are of such a legal character that at law the assignee would be permitted to sue in the assignor's name then the interest of the assignor is legal. (63 N. Y. 8), 50 Ind. 319; 38 Wis. 542). It must be strictly observed that if a thing in action is a claim purely equitable in its nature, or if it is one which the courts of equity alone recognize — as for example, an order given upon a particular fund or an assignment of part of a single demand — then the assignor's interest is still equitable. (Pomeroy's Eq. Jur., Vol. III. p. 285).

As to the things in action which are or are not as-

signable. The following rule is given by Mr. Pomeroy: "All things in action which survive and pass to the personal representatives of a decedent creditor as assetts, all continue as liabilities against the representatives of a decedent debtor, are in general thus assignable; all which do not thus survive but die with the person of the debtor or creditor, are n ot assignable. The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract express or implied, with certain well defined exceptions; and those arising from torts to real or personal property, and from frauds, deceits, and other wrongs, whereby an estate, real or personal, is injured, diminished or damaged. The second class embraces all torts to the person or character where the injury and damage are confined to the body and the feeling; and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to a person, such as promises to marry, injuries done by the want of skill of a medical practitioner, contrary to his implied undertaking, and the like; and also those contracts, so long as they are executory, which stipu-

late solely for the special personal services, skill or knowledge of a contracting party". (Pom. Eq. Jur. Vol. III. Sec. 1275 and cases cited).

We thus see that large classes of things in action may be assigned both at law or in equity. But there are many assignments which are prohibited by the law as against public policy. Any assignment of a chose in action which violates the law of champerty and maintenance, as operating merely to encourage litigation, are held void both at law and in equity. In England a person cannot assign his salary or other emolument for past or future service to the country which is regarded as honorary or which dignifies the person by labelling him as a quasi-public individual. (T. and R. 459; L. R. 7 Ch. 109). It is probable that in the United States any public officer would ba allowed to assign his official salary provided no statute expressly or impliedly prohibited it. Still the following have been held to be not assignable:— the salary , not yet due, of a public officer (Beale v. McVicken, 8 Mo. App);202);Claims againstthe United States in some cases; in Becker v. Sweetzer (15 Minn. 327) defendant retained the plaintiff in aiding

him to collect a claim due him from the United States for services rendered to certain Indians of the Sioux tribe for the payment of which claims the United States had already made provision; and for the ascertainment and payment of such sums defendant was to pay plaintiff one fifth, and for that consideration assigna and transfer to the plaintiff an equal and undivided one fifth parto of said claims; this assignment was held void by the cout courts . (Wanless v. U. S., 6 Ct. of Cl. 123; Danklesson v. Braynard, 3 Daly 183; St Paul R. R. v. U. S. 112 U. S. 733; a presumption of right, Whitney v. Buckman, 13 Cal 536; a bare right to file a bill in equity, Dayton v. Fargo, 45 Mich. 153; a mere right of action for a tort, gardner v. Adams, 12 Wend. 297; Dickinson v. Seaver, 44 Mich, 624; Linton v. Hervey, 104 Mass. 353.). It is also held, "that an order drawn on a fund for only a part thereof does not amount to an assignment of that part, for the reason that a creditor shall not be permitted to split up a single cause of action into many actions without the assent of the debtor. In other words -------- a part only of a chose in action cannot be assigned"without the consent of the debtor. (Bispham's Prin. of Eq.

p. 219 and cases cited). But in Indiana such an assignment may be sustained for certain persons. In Lapping v. Duffy (47 Ind. 51), part of a judgment was assigned, and the court in considering the question observed "We think it does not follow that there must be diverse actions, if the assignment of part of the judgment is recognized as valid. The several parties owning the judgment may unite in an action upon it". But the court does not decide this point as the judgment was given on the ground that the judgement debtor and the defendant Duffy assented to the assignment of part of the judgment to the plaintiff. It is the general rule that a municipality is not bound to recognize such a partial assignment of a contract to which it is a party. (Phil. App. 86 Pa. St. 179). The lien of a vendor for purchase money is not assignable (Richards v. Leaming, 27 Ill. 431). Nor can a contract founded in a personal confidence and trust, (Landon v. McCarthy, 45 Mo. 106); nor a right of entry for a condition broken (McMahon v. Allen, 34 Barb. 56); nor the right to cancel usurious contracts by action (Bouton v. Smith, 26 Barb. 635, but see Spicer v. Jarrett, 58 Tenn. 454).

In the procedure of many of the states of the Union principles both of law and of equity are applied by the same court; so that the assignee, whether his remedy be at law or in equity, presents his claim to the same tribunal. Moreover, it is generally decided in this country that a legal assignment of a legal thing in action confers only a legal interest and the assignee can sue in his own name only by a civil action which is essentially legal in its character. Even where the thing in action assigned is equitable, or such as the courts of law would not formally recognize, still the assignee must sue in his own name; and where there are no principles peculiar to equity to be applied his procedure and remedy would be to all intents and purposes legal. But if the recovery depended on the application of purely equitable doctrine the equitable jurisdiction of the court would be invoked and the procedure and remedy would be equitable in nature.

We have thus far noticed the salient points of difference between the attitude of law and equity towards the assignments of choses in action. Thus far the discussion has been general. It has been shown how the early common law absolutely refused to recognize the assignment of a chose in action or anything not in esse

We have next to consider particularly the attitude of equity toward some other assignments which the law refused to recognize, but especially of asignments of a fund.

C H A P T E R IV.

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WHAT COULD BE ASSIGNED IN EQUITY THOUGH NOT AT LAW.

"A party may purchase the whole interest of another in a contract or security or other property which is in litigation, provided there be nothing in the contract that savors of maintenance". That is, provided he does not attempt to pay any costs nor make any other advances beyond the mere support of the exclusive interest which he alleges to have acquired. (Williams v. Prolheroe, 5 Bing. 309; Grill v. Levy, 16 C. B. n. s. 73). It is perfectly clear that a person may assign the equitable interest which arises under a contract for the conveyance of real property. A person claiming under such an original contract may sell or otherwise assign the equitable interest so accruing to him under the transaction; and he stands in equity in the position of a trustee for all those persons who are purchasers from him of his equitable interest. Moreover it has been held in numerous cases that "Equity not only allows but actually compels him to permit the sub-purchasers to use his name in all

proceedings for obtaining the benefit of their contract." (Deaver v. Eller, 7 Ired. Eq. 24; Dibble v. Scott, 5 Jones's Eq. 164). Such proceedings would have been deemed shocking by the conservative and unalterable judges of the common law. In the same manner, if there should be a trust estate in land either actual or constructive, which however is denied by the trustee, still the cestui que trust may assign his alleged interest and the assignee may in equity enforce his right to the interest under the trust.(Baker v. Whiting, 3 Sumner 475). In Hartley v. Russell(2 Sim. & Stu. R. 244,(, a creditor who had instituted proceedings at law and in equity against his debtor, entered into an agreement with said debtor whereby the creditor was to relinquish certain securities which he held of the debtor providing the debtor would give him a lien upon other securities in the hands of another creditor; The debtor was to give the creditor authority to institute proceedings against such other creditor and aid him in all ways to collect from the securities. In equity it was held that the agreement was valid and not maintenance. These illustrations are sufficient to show how far the courts of eq-

uity will go in carrying out assignments which in law would be wholly disregarded.

A mere expectancy, as that of an heir at law to the estate of his ancestor, could be assigned in equity. (Hobson v. Trevor, 2 Pr. Will. 191; Wethered v. Wethered, 2 Sim. 183-192; Steele v. Freeborn, 3 S. W. (tenn) 649; but see Alves v. Schlessinger, 81 Ky. 290). A person might assign a legacy or a share of a residue. The interest which one might take under the will of a person then living (Beckley v. Newland, 2 Pr. Will. 182); or the share to which a person may become entitled under an appointment (musprat v. Gordon, 1 Anst. 34) or in the personal estate as presumptive next of kin of a person then living (hinde v. Blake, 3 Beav. 235); all these are assignable in equity for a valuable consideration, and when the expectancy has fallen into possession the assignment will be enforced. The assignment of future freights, of future patent rights, of the profits arising from the working of patents by a licensee, of future dividends upon proof in bankruptcy, of the future cargo of a ship, of building material to be brought on the premises or machinery at a future time ta be added to or substituted for existing machinery, of goods and chat-

tels now being or which shall hereafter be in or about a messuage or house, is enforceable in equity. (Robinson v. McDonald, 5 Man. & Sal. 228; Brown v. Tanner, 3 L. R. Ch. App. 597; Printing Co. v. Sampson, 19 L. R. Eq. 462; Bergmann v. McMillan, 17 Ch. Div. 423; In re Irving, 17 Ch. Div. 419; In re Ship Ware, 8 Price, 269; Brown v. Bateman 2 L. R. C. P. 272; Holroyd v. Marshall, 10 H. of L. 191; Ex Parte Games, 12 Ch. Div. 314). Of course a contract to trnasfer property not in existence cannot operate as a present alienation, because there is nothing at the time which can be subject to the mandate of the court; but as soon as the subjest of the transfer materializes, or immediately upon its acquisition, the assignor h lds for the assignee, whose title to the chose is perfect and cannot be disturbed by execution creditors of the assignor. (Pierce V. R. R. Co., 24 Wis. 551; Pennock v. Coe, 23 How. 117; Morril v. Moyes, 56 Me. 465; Beall v. White, 4 Otto, 387). In the Matter of the Sankey Brook Coal Co. (9 L. R. Eq. 721), the directors attempted to mortgage or charge the plant and property including all the personalty, in order to secure the repayment of money borrowed for various purposes. It was

held that the proceeds of a call already made but not yet paid might be charged, but not the proceeds of a future call. In this country it is well established that mortgages on personal property to be acquired in the futu ture are valid in equity; as are also assignments of future acquisitions, mortgages given by railroads on rolling stock and other personal property.(Jones on Mort. Secs. 153, 154, 452; Collin's Appeal, 107 Pa. St. 590; Sitters v. Lester, 48 Miss. 513; Walker v. Vaughn, 33 Conn. 577; Galveston R. R. Co. v. Coudry, 11 Wall. 459; Smithurst v. Edmunds, 14 N. J. Equ. 438). A contract made by bridge commissioners of a county to pay a certain sum of money for a bridge subscribed therein and for the erection thereof upon the completion of such bridge as fast as the money is collected by the tax collector, is assignable.(Smith v. Hubbard, 2 S. W. (Tenn.) 569). A mechanic's lien, although inchoate, is assignable, ((McDonald v. Kelley, 14 R. I. 335). So is an attorney(s lien for services on a judgemnt. (Sibley v. Pine Co., 31 Minn. 201).

From these examples and illustrations many of which are given in the note appended to the case of Ryall v.

Rowles, in Vol. of White & Tudor's Leading Cases in Equity will serve to show in part what assignments were valid in equity which were held void at the common law. The reported cases and the resulting illustrations under them are legion, and only a bare outline of the most important principles can be given in a work of necessarily so small compass. I have examined a large number of the cross references and there number and ramifications are so large and bewildering that the hope of a somewhat thorough and orderly discussion of two or three of the leading cases on each principle and exception has been abandoned.

C H A P T E R V.

WHAT AMOUNTS TO AN EQUITABLE ASSIGNMENT.

No certain or particular form of words is necessary in order to make a valid equitable assignment of a chose in action. (Rowe v. Dawson, 1 Ves. Sr. 331; Thompson v. Spier, 13 Sim. 469; Tingle v. Fisher, 20 W. Va. 497; E. Lewisburg v. Marsh, 10 Norris 100; Buck v. Swazly, 36 Me. 41; Conway v. Cutting, 51 N. H. 407). The English and American rules are practically the same, the minor differences being due to differences in circumstances and condition, and not in principle. The great English case as to what constitutes an equitable assignment is that of Row v. Dawson (supra). In that case it appeared that one Gibson had lent money to parties under whom the defendnat claimed and gave them an order on Swinburne, the deputy of Horace Walpole, who was an officer of the exchequer, for the payment out of the monies due to him from Walpole out of the Exchequer, of 400 pounds to one person, and300 ppunds to the other, "value received". The question was whether these persons were entitled to be classed as equitable assignees of the monies due from

the exchequer to the estate of Gibson, he having become a bankrupt. It was held that the order amounted to an equitable assignment of the funds. The case followed Warmstrey v. Lady Tanfield (1 Ch. Rep. 29) and was followed by Ryall v. Rowles (1 Ves. Sr. 348,), and Bryce v. Banister (3 Q. B. D. 569) decided in 1878. These cases uniformly lay down the rule that no particular words are necessary to create an assignment of a chose in action or a fund — that there must be a clear intention to make the assignment — that the fund or property must be specifically pointed out — and that there must be an absolute appropriation of the property which is the subject matter of the transaction. In other words, the evident principle to be deduced from the cases is that an agreement between a debtor and a creditor that a debt owing shall be paid out of a specific fund coming to the debtor and such acts accompany the agreement or follow it as indicate an appropriation of the fund to the assignee, or an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, will create a binding equitable assignment of so much money. (Benjamin on Sales, pp. 62-

67; Bryce v. Banister , supra;). In the decisive case of Ex parte Alderson(1 Madd. 53) where the same question arose, Sir Thomas Plummer M. R. made the following observation:— "Is this draft to be considered in equity as an assignment of the debt, which is a chose in action? And did not the executor bind himself to pay it? I think it was a good equitable assignment" since the property had been specifically pointed out and appropriated with intent to charge. The intention to create a charge must always be shown. Thus a mere authority to a person to draw to the extent of a specified amount, as , for example, a mere letter of instruction to a banker not written with any intent to create a charge on a fund in his hands will not amount to an equitable assignment of the fund. (Hopkinson v. Forster (19 L. R. Eq. 74). Nor is a check an equitable assignment of the drawer's balance at the bankers upon whom it is drawn.(Hopkinson v. Forster supra).

With practically all the principles thus laid down by the English courts the law of this country is in unison as the following examination willshow.

What is necessary to constitute a valid equitable

assignment has been well expressed by the Supreme Court of the United States in the Case of Christmas v. Russell (14 Wall. 69) The Court, speaking through Mr. Justice Swayne, says, "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material providing the intent to transfer is manifested. Such an intent and its execution are indispensable." To make an equitable assignment, there must be such an appropriation of the subject matter as to confer a complete and present right on the parties intended to be provided for, even where the circumstances do not admit of its immediate exercise. In the Case of Dickinson v. Phillips(1 Barb. 454) the defendant being indebted to the plaintiff gave him security on a schooner, agreeing at the same time that he would procure an insurance on the vessel and transmit the policy to the creditor. He subsequently insured the schooner in the name of G, a third party, and informed plaintiff that he had done so and that G would hold the insurance subject to the order of the plaintiff. Notwithstanding these statements and allegations the

court refused to recognize the transaction as an equitabel assignment. Harris, J., delivering the opinion of the court said:- "It is true that no particular form of words is necessary to constitute an equitable assignment. But there must at least be evidence of an intention to appropriate the fund." It seems that the acts of the defendant were not sufficient in the judgment of the court to make the transactionan equitable assignment. However, where a purchaser agrees to insure for the benefit of his vendor and to assign the policy for his security, and he subsequently procures the building to be insured, but does not assign the policy to the vendor, the agreement operates as an equitable assignment of the money payable upon the policy, in case of loss, but not as an assignment of the policy.(Cromwell v. Insurance Co, 39 Barb. 227).

The question as to what is sufficient to constitute an equitable assignment of a fund was quite thoroughly discussed in Bank of Commerce v. Bogy (44 Mo. 13). The court said,- "A bill drawn upon a debtor does not of itself operate as an assignment in equity of the debt, even if it is negotiated for a good consideration." And

Kimball v. Donald(20 Mo. 517) states the rule thus: Anything which shows the intention on the nne side to make a present irrevocable transfer of the fund, and from which an assent to receive it can be inferred from the other, will operate in equity as an assignment, if supported by a sufficient consideration". (Kessil v. Alnetis, 56 Barb. 362; Noyes v. Brown, 33 Vt. 431; Arpin v. Burch, 32 N. W. 681; Gage v. Dow, 59 N. H. 383; Bower v. Bluestone Co., 30 N. J. Eq. 171). But in Georgia, where the thing assigned is a chose in action, the assignment must be in writing (Insurance Co. v. Walrar, 30 Fed. Rep. 653).

Upon this examination of a few of the earlier leading cases on what constitutes an equitable assignment, we begin to perceive what it is that equity requires before it will take cognizance of an alleged assignment. In the first place there must be a clear intent, either express or implied, to appropriate the fund. It is the first maxim of the law as well as of equity that great diligence and care must always be observed in order to give force and effect to the intent of the parties, if that intent is not illegal or the carrying out of the in-

tent does not contravene public policy. If the court cannot find in the transaction itself an intent to appropriate the fund it will never manufacture such an intent. The reason for this is found in the very nature of equity itself. Equitable principles exist to give justice to litigants; and this never can be done by manufacturing intent or by giving false interpretation to those already existing. Another reason why equity requires a clear intent to appropriate is found in the fact that the doctrine of equitable assignments is entirely foreign and contrary to the early common law. It is a primitive doctrine of the law that no action on contract can be maintained in a court of law except among parties between whom there is a privity of contract relation. No doubt this extremely technical rule has been softened considerably by contact with the more elastic principles of equity; so that at the present time in most of the states an action can be maintained by A. upon a promise made for his benefit to B. even though A. id not privy to the consideration. But this is opposed to the original principles of the common law as is shown by the great controversy which has arisen concerning one phase of the

subject exemplified in the New York case of Lawrence v. Fox(20 New York 268); and equity, before modifying the common law, always requires good and sufficient reasons shown. One of the most important of these reasons is a clear unequivocal intent. (Brill v. Tuttle, 81 N. Y. 454).

Another pre-requisite to a valid equitable assignment of a fund is its absolute appropriation. So long as the debtor exercises control over the fund the transaction is equivocal because his retaining control over it is legally inconsistent with the purpose to which the creditor alleges it to have been dedicated. A valid equitable assignment transfers an ownership to equitable property. The right transferred is more than an equitable lien or charge. It as an equitable property and ownership. But ownership implies absolute and unqualified control by the assignee of the thing assigned or its proceeds, Therefore when the alleged assignor retains control over the fund he exercises the prerogatives of ownership; that is to say, he exercises a dominion over the property inconsistent with the dominion of any other person. Equity takes him at his word, or rather his

act, and refuses to recognize any other ownership by construing the transaction into an equitable assignment. It has, therefore, been uniformly adjudged in this country th at the transfer of the fund to the control of the assignee must be absolute.

One of the earliest New York cases in substantiation of this position is Rogers v. Hosack's Executors (18 Wend. 319). Here one, Gracie, had covenanted with the plaintiffs to pay them the balance of their debt with certain French funds when he should receive them. This was held by the court not to be an equitable assignment of the fund. It seems plain that had Gracie survived the treaty by which the French funds were to be obtained, the plaintiffs might have sued him at law for not paying their share as per contract. This would have been their only remedy. There was no assignment, no mortgage, no pledge, no order, or any othe specific appropriation of the French fund, but a mere covenant to pay them on their being received by the covenantor. Such an agreement does not create any lien either at law or in equity. (In re Holmes, 2 Rose's Cas. in Bankr. 355; Williams v. Everett, 14 East, 582; Clayton v. Fawcett, 2 Leigh, 19;

Brainard v. Burton, 5 Term Rep. 97). In the early case of Mandeville v. Welch (5 Wheat. 277), decided in 1820, the United States Supreme court speaking through Justice Story, laid down the principle in a similar manner. There the court laid down the doctrine that where an order is drawn either on a general or particular fund the appropriation must be absolute and unequivocal. This decision was followed in 1831 by the court in Shanckland v. Washington (5 Peters 389), and also in Tiernon v. Jackson (5 Peters 580). In the latter case there was an assignment of a cargo of tobacco, made while the tobacco was on its way to the consignees for sale, by indorsement on a duplicate of the invoice, andwhich directed the consignee to pay a specified sum from the proceeds of their sales to the persons named, who were creditors of the consignor. It was here held that, under the circumstances, the indorsement was not sufficient to give a payee named in the assignment a right of action against the consignee for a portion of the proceeds of the sales as money received to his use. The assignment did not purport to be (and here is the important point) an absolute transfer of all the interest of the assignor in thetobacco, so

as to divest him of control over its management and put it immediately at the risk of the assignee. The parties evidently contemplated a sale to be made by the consignee, and the assignment was not of the tobacco itself immediately, but a portion of the fund to arise from its sale at a future period. It did not pass nor purport to pass the legal title in the tobacco or its proceeds, but merely created an equitable interest in the proceeds after sale, for the benefit of the assignees.

In New York the case of Roger v. Hosack's Executors (supra) and Dickinson v. Phillips(supra) have been uniformly followed in holding that no equitable assignment of a fund or other property would be recognized as such by a court unless there had been an unqualified appropriation of the property by the assignee. This appropriation may be evinced in many ways. The most usual way is that of an unrestricted delivery of the order to the assignee or payee. This is clearly stated by Judge Rapallo in Brill v. Tuttle (81 N. Y. 454). The following is his language:— "There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him

to the drawer, the delivery of the order to the payee operates as an assignment protanto of the fund, and the drawee is bound, after notice of such assignment, to apply the fund as it accrues, to the payment of the order and to no other purpose ----------".

The case of Brill v. Tuttle (supra) is a leading case in New York on the equitable assignment of a fund and the principles therein enunciated deserve further attention. These are the facts: A. and Co. who were repairing a house for the defendant for a valuable consideration, executed and delivered an order to the plaintiff, directed to defendant, asking him to pay plaintiff a certain sum due the plaintiff from A. and Co. for materials furnished. The work was nearly done when the order was executed. It was held that the order did not necessarily require a construction holding that it was a request to pay in advance the sum specified; that the direction therein, in connection with the surrounding circumstances, indicated the intent to have been simply to direct payment of such sums as were or might become due to the drawers on the account for repairs, up to the amount specified. "It is equally well established" said

the court, " that if a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, then designation by the drawer of a particular fund out of which the drawee is to reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into a consignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts. In all cases therefore in which a particular fund, to accrue in futuro is designated in the draft, and the language is ambiguous, the turning point is whether it was the intention of the parties that the payment should be made only out of the designated fund, when or where it should accrue, or whether the direction to the draw ee to pay was intended to be absolute and the fund was mentioned only as a means of reimbursement, or an instruction as to book-keeping." If it was the intention of the parties that the payment should be made only out of the designated fund, when or where it should accrue, it would be an equitable assignment pro-tanto of the fund; but if it was

their intention that the payment should be absolute, and the fund was mentioned only as a source of re-imbursement it would not be an equitable assignment of such fund.

Some authorities contend that Brill v. Tuttle does not follow the cases of Kelly v. Mayor(4 Hill, 263) and Shaver v. Telegraph Co.(57 N. Y. 459). In the former case the Mayor drew a negotiable draft on the treasurer of the city: "Pay to A. L. or order, $1500 award number 7, and chargetto Bedford road assessment." This was held to be not an equitable assignment; but it is a very different case from that of Brill v. Tuttle. The first point of difference is that Kelly v. Mayor was not the case of an order drawn by a creditor on a debtor and payable to a third person. It was proved also, that the treasurer, at the time, had no funds in his hands arising from the Bedford Road assessment. Moreover, the evident intention of the Mayor was not so much that it should be payable out of a particular fund, as that it shouldbe regarded merely as instruction for the guidance of the treasurer to make plain the respective accounts of the city department. The instrument, therefore, retained its character as a negotiable bill of exchange.

A comparison of Brill v. Tuttle with Shaffer v. Telegraph Co. discloses even greater discrepancies than we were observed in the comparisons just made. There the defendant wrote B, an employe that if he would make an order on the treasurer of the defendant of the defendant for any part of his salary to be paid to a third person, the sum named by B. would be paid monthly until B. revoked the order. B. took advantage of the offer ordering a monthly sum to be paid to plaintiff. The order and letter was delivered to N. for a valuable consideration, who filed them with the cashier. B. subsequently wrote the treasurer saying that "if not accepted" he countermanded the order. Action was brought to recover the sums which defendnat refused to pay plaintiff. In contradistinction to the case of Brill v. Tuttle we observe thatthe order was given by B. in pursuance of a previous arrangement with the defendant whereby B. the drawer, could revoke the order at any time. It is exceedingly clear that this assignment or appropriation is not absolute. The drawer does not relinquish his dominion and control over the fund. The order which B. drew actually gave notice to the drawee that it was not

to be understood as an absolute assignment of the sum that should become payable at the end of each month, but that it was always subject to the reserved right of B. to revoke it. Any person taking the order took it subject to this right. B. exercised that right according to the conditions of the order and no complaint could be made to the action as the agreement cantained on its face the very stipulations of which B. took advantage.

In Lowery v. Steward (25 N. Y. 239), a letter to the consignee of cotton by the consignor stating that he had drawn on the consignee for $500 payable to a third person, when the cotton should be sold, was held to be such a specific ppropriation of the fund to accrue in futuro as would amount to an equitable assignment of the same. This case follows and sustains Hall v. City of Buffalo (1 Keyes, 193). In this case a contractor to whom the city of Buffalo was largely indebted, drew orders upon th the comptroller of the city, who, according to the established usage of the city, received noticess of the claims against the city by third parties, in favor of divers parties upon the fund Held for the payment of such claims The orders were held to be equivalent to an equivalent

to an equitable assignment pro tanto of the funds in the treasury of the city. (Peyton v. Hallet, 1Caines, 363; Martin v. Naylor, 1 Hill, 583; Field v. Mayor of New York 2 Seld. 179; Luff v. Pope, 5 Hill, 417; Harris v. Clark, 3 Comst. 93). The question in Parker v. City of Syracuse(31 N. Y. 375) presents the same problem and deals with it in the same way. In Alger v. Scott(54 N. Y. 14), an order was drawn by a landlord upon his tenant in August, 1866:- "Pay to J. H. G. $346 and charge the same to me, account of rent of house 13 Cheever Place". Nor rent was due at the time. The tenant accepted the order but did not pay it at once. The landlord began an action for the rent in November, 1866. Defendant put in the order from the landlord and his acceptance of the same as a defence. The court held it not a good defence because there was no consideration for the equitable assignment and it was therefore void and the landlord could recover. (Ehrich v. DeMill, 75 N. Y. 370 ; Munger v. Shannon, 61 N. Y. 251; Risley v. Smith, 64 N. Y. 576; Gibson v. Lenane, 94 N. Y. 183; Conselyea v. Banchard, 103 N. Y. 222; Laner v. Dun, 115 N. Y. 405; Fairbanks v. Sargent, 117 N. Y. 32 0).

It is well settled that no action at lawcan be maintained by the payee against the drawee on an unaccepted check. (Bank v. Schuler, 120 U. S. 511; Bank v. Millard, 10 Wall. 152; Carr v. Bank, 107 Mass. 45; Sayles v. Bushong, 100 Pa. St. 23; Bank v. Bank, 69 Ind. 236). But there has been considerable dispute at various times as to whether or not a check or draft drawn upon a fund more than sufficient to pay it operates as an equitable assignment of the amount for which the check is drawn, as between the drawer and the payee. The Circuit Court of the United States has thrown the weight of its authority in the affirmative. In the case of the German Saving Inst. v. Adae,Chief Judge McCrary said: "There is certainly no good groundfor hold ing that a check or draft, drawn upon a fund in bank, is not an equitable assignment as between the drawer and the payee; and in a case where there is no controversy as to the rights of the bank or drawee, it does not lie in the mouth of the drawer or his assignee, to say that such an instrument is not an equitable assignment". The same rule is held in the following cases: Roberts v Austin(26 Iowa, 315); Munn v. Burch (25 Ill. 35); Bank v. Patton(109 Ill. 479); Bank v. Bank (114 Ill. 483). This point however has not

been passed upon by the United States Supreme Court. (Bank v. Schuler, 120 U. S. 514). But this is entirely contrary to the doctrine as established in NewYork and in England. In Atty General v. Ins. Co. (71 N. Y. 325), Church, C. J., spoke as follows: "The doctrine (that a check is not an equitable assignment) accords with the relations between the parties. A check is a request of a customer to pay the whole or a portion of such indebtedness to the bearer or to the order of the payee. Until presented and accepted it is inchoate; it vests no title or interest, legal or equitable, in the payee to the fund. Before acceptance the drawer may withdraw his deposit; the bank owes no duty to the holder of a check until it is presented for payment. Knowledge that check have been drawn does not make it obligatory on the bank to retain the deposit to meet them. These rule s are indispensable to the safe transaction of commercial business. Any other rule would produce confusion, andinvolve banking institutions and all depositories of monies in responsibility to conflicting claimants, which, while producing great embarassments, would serve no beneficial purpose. (Bank v. Bank, 46 N. Y. 82; Tyler v.

Gould, 48 N. Y. 682). The Englsih courts are in unison with those of New York. (Hopkinson v. Forster, L. R. 19 Eq. 74).

We have thus far discussed the two conditions which must concur before an equitable assignment of the fund can be made. They are the intention of the parties, and the absolute appropriation of the subject matter. There is practical unanimity among the courts both of the United States and Englend in laying down the principle; but in attempting to arrive at just what acts constitute an appropriation, they sometimes differ. It can be generally stated that the answer to the question, at whose risk do the goods remain,solves the problem, The only difficulty encountered is in answering the question. It depends almost entirely upon the facts and circumstanes of each particular case. To be sure, illustrations can be given so broad that we can say unhesitatingly that such a state of facts could not possibly amount to an equitable assignment; or circumstanes could be detailed so clearly within the rule that we could declare as confidently that this state of facts must inevitably constitute an equitable assignment. But between these two ex-

tremes lie practically all the cases that are ever litigated; and with reference to all these, each controversy, while being governed by the principles already laid down, must of necessity be decided largely if not entirely with reference to its own peculiar circumstances and conditions.

CHAPTER VI.

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NOTICE — EQUITIES.

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It is a familiar doctrine that whenever a debtor makes to his creditor an equitable assignment of a specific fund or debt in the hands of or owing by a debtor, the assent of such third person is not necessary to the validity of the assignment; andyet the assignment is not absolute and is subject to revocation by the assignor at any time before the assignee has been notified of the transaction and, either expressly or impliedly, manifested his assent. (Scott v. Porcher, 3 Meriv. 652; Garrard v. Lauderdale, 2 Russ. & M. 451). This is but an illustration of the simple rule that a complete contract requires an acceptance, as well as an offer, and requires no citation of authorities for its support.

It is also a familiar doctrine that to render the assignment perfect and valid as against the assignor himself — that is, to give the assignee a claim upon the fund and a right of action to secure it — no notice of the assignment need be given to the debtor or other person holding thefund. It is not quite so certain whether

such a statement can be made with respect to those who are related to the assignor as judgment creditors and mere volunteers under him. It has been so held, however, by eminent English courts. (Beavan v. Lord Oxford, 6 D. G. M. & G. 492; Kinderly v. Jervis, 22 Beav. 1). But when we turn from the consideration of the relations between the assignor and the assignee, to a view of those subsisting between the assignee and the debtor or the holder of the fund or subsequent assignees, it is at once evident that the reasons which control in the former case do not exist in connection with the latter. So it is firmly established that, as against subsequent assignees for a valid consideration, a notice to the debtor, trustee, or holder of a fund, is necessary in order to perfect the assignment and render it valid and effectual. Qui prior est tempore, potior est jure, is the well known maxim of the law regarding the position of litigants in courts of law as to their respective rights in the same property. This rule always controls where, by the first contract, all the thing is given; for then there is nothing to be the subject of the second contract and priority must decide. But there are certain conditions under

which this legal maxim cannot be implied. For example the rule is not to be resorted to when the question does not lie between bare and equal equities. In all cases of equitable assignments the legal title is outstanding; and of such circumstances it can not be contended that priority of time is ~~not~~ decisive, because the equities may not be at all equal. "If at any time there appears to be, in respect to circumstances independent of priority of time, a better title in the subsequent purchaser to call for the legal estate than in the purchaser who precedes him in date, the case cease s to be a balance of equal equities, and the preference, which priority of date might otherwise have given, is done away with and counteracted". (Dearle v. Hall, 3 Russ, 1). It may be contended that notice is not a necessary requisite to the conveyance of an equitable interest. It is true that if one wishes to rely on the contract merely, he does not need to give notice; for from the moment of the consummation of the transaction the assignor is personally bound. But if it is desired, asit almost inevitably is, to attach one's right upon the thing itself, notice must be given. "If you omit to give that notice you are

guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title, in the actual possession andunder the absolute control of another person". If the chattel is conveyed to an innocent third person fro value, the real owner is estppped from attempting a recovery. Giving notice is regarded as equivalent, or atleast analagous to the act of taking possession.

It should be carefully obeserved, however, that to enable a subsequent assignee to obtain a priority in this manner , by giving the first notice to the debtor or legal holder, he must be an assignee in good faith and for a valuable consideration. This is the English rule and has been adop ted in this country.

In the case of Tallman v. Hoyt (89 N. Y. 537) it was held that a valuable consideration was an essential element of an equitable assignment (Stone v. Frost, 61 N. Y. 614).

The assignee of a chose in action, whether it be a debt or an obligation, or a trust fund although without notice, in general takes its subject to all the equities which subsist against it. In the leading case of Bush

v. Lathrop (22 N. Y. 535), a mortgage was transferred by a subsequent assignee thereof, by an instrument absolute on its face, but was taken in fact as security for a much smaller sum than that due upon the mortgage, and the second assignee transferred it for full value to a third person without notice. It was held that equities existing between the assignor and assignees of a chose in action not negotiable, attend the title transferred to a subsequent assignee for value and without notice. The latter takes the exact position of his vendor. (Beebe v. Bank, 1 Johns. 529; James v. Murray, 2 Cow. 246; Covell v. Bank, 1 Paige, 131; Muir v. Schenck, 3 Hill, 328; Poillon v. Martin, 1 Sand. Ch. 569; Sweet v. Van Wyck, 3 Barb. Ch. 647). Chief Justice Ruger lays down the same rule in Fairbanks v. Sargent (104 N. Y. 108), citing Bush v. Lathrop (supra) with marked approval (Litchfield v. Bank, 97 N. Y. 581; Cowdrey v. Vandenburg, 100 U. S. 572). The reason of this rule is very evident: The holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is the question of powet and capacity to transfer to another and that capacity is to be exactly measured by his own

rights. (Greene v. Warwick, 64 N. Y. 2 20; Union College v. Wheeler, 61 N. Y. 88).

As we have already seen the notice should be given to the debtor, trusyee, or other holder of the fund, either in writing or verbally; but if the notice is verbal it must be explicit, definite, and certain. (In re Tichener 35 Beav. 317; Brown v. Savage, 4 Drew, 635). The rule as to notice does not apply to negotiable instruments nor to assignments of equitable interests in land, but applies only to personal property debts, money claims arising from the contract, funds and the like. (Glyn v. Hood, 1 De. G. F. & J. 334; Jones v. Jones, 8 Sim, 633).

It is ageneral principle irrespective of any requirement to give notice in order to obtain priority, that the duty rests upon all assignees of things in action to use reasonable diligence in perfecting their titles or in enforcing their rights. An assignee may lose priority throught his laches as against a subsequent purchaser fnrgood faith and for value, who has been injured by the negligence. It is a general rule that the assignee should take all steps permitted by law which are equivalent to actual possession